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### Advocating Equality: Judge Theodore McMillian's Civil Rights Jurisprudence and St. Mary's Honor Center v. Hicks

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**ADVOCATING EQUALITY: JUDGE THEODORE MCMILLIAN'S  
CIVIL RIGHTS JURISPRUDENCE AND *ST. MARY'S HONOR  
CENTER V. HICKS***

LELAND WARE\*

THE EARLY YEARS: SEPARATE AND UNEQUAL

Judge Theodore McMillian was born in St. Louis, Missouri, in 1919. His family resided in a run-down neighborhood at Fourteenth street and Papin.<sup>1</sup> Judge McMillian's parents separated when he was seven years old. (Both parents subsequently remarried). McMillian attended Vashon High School in St. Louis and subsequently enrolled in Lincoln University in Jefferson City, Missouri. These were all racially-segregated institutions. During the 1930's and 40's, an elaborate system of state-sponsored segregation governed the legal, economic and social relationships between whites and African-Americans. Opportunities for African-Americans were severely circumscribed. When Theodore McMillian graduated Phi Beta Kappa from Lincoln in 1941, the racial barriers were such that the best employment he could obtain was a position as a dining-car waiter on the railroad.<sup>2</sup>

McMillian planned to save money to attend graduate school but his plans were interrupted by the outbreak of World War II. Like thousands of other Americans, McMillian was drafted into the military. Although he served as an officer in the United States Army and fought alongside allied troops in France and Germany, he lived in segregated facilities and was barred from the white officer's clubs. When he was discharged in 1946, McMillian achieved the rank of First Lieutenant in the Army's Signal Corps.

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1. Marguerite Shepard, 'Do-Gooder' Who Knows the Score, ST. LOUIS GLOBE DEMOCRAT, Nov. 18, 1967, at 1F; James Floyd, *He Came Up the Hard Way: Judge Theodore McMillian May be Named to U.S. Court of Appeals*, ST. LOUIS GLOBE DEMOCRAT, July 15, 1978, at 1F; William J. Shaw, *Why Judge McMillian Worries*, ST. LOUIS POST-DISPATCH MAGAZINE, Aug. 11, 1991, at 9.

2. Shepard, *supra* note 1, at 1F; Floyd, *supra* note 1, at 1F; Shaw, *supra* note 1, at 9.

## PURSUING A CAREER IN THE LAW

After the War, Theodore McMillian returned to St. Louis and enrolled in law school at St. Louis University.<sup>3</sup> By this time, McMillian had a wife and young child to support. His veteran's educational benefits did not cover all of his expenses. To make ends meet he found a part-time job. "Every morning he got up at five o'clock and went to the Samuel Shoe Company, where he cleaned toilets and washed windows before his eight a.m. law classes."<sup>4</sup> McMillian graduated at the top of his class in 1949 after becoming the first African-American to be admitted to Alpha Sigma Nu, a Jesuit Honor Society.<sup>5</sup> After he completed his law studies, McMillian established a practice with Alphonse Lynch, the only other African-American in his class at Saint Louis University. In 1952, McMillian decided to enter the political arena.

He ran for Nineteenth Ward Committeeman. In an interview with a reporter that appeared several years later, Judge McMillian recalled his defeat stating that, "I was beaten terribly." During the campaign however, McMillian supported several democratic office-seekers. His efforts on behalf of the successful Circuit Attorney candidate, Edward L. Dowd Sr., led to his appointment as an Assistant Circuit Attorney in 1953. It was in this capacity that McMillian proved himself as a skillful trial attorney. A string of victories and his successful prosecution of a prominent local politician cemented his reputation in legal circles.

In 1956, Governor Phil Donnelly appointed McMillian to serve as a Circuit Court Judge in the City of St. Louis. A 1956 newspaper article noted that McMillian was "the first negro ever made a Circuit Judge in the state."<sup>6</sup> During the mid-1960s, Judge McMillian presided over the St. Louis Juvenile Court. In 1972, he advanced further in the judiciary with his appointment to the Missouri Court of Appeals.<sup>7</sup> Then, in 1979, President Jimmy Carter appointed him to the United States Court of Appeals for the Eighth Circuit.<sup>8</sup> McMillian was the first African-American appointed to these positions.

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3. The first African-American undergraduates enrolled in 1944.

4. Shepard, *supra* note 1, at 1F.

5. *First St.L.U. Negro Named to Jesuit Honor Fraternity*, ST. LOUIS GLOBE DEMOCRAT, Feb. 19, 1949, at 1A.

6. John R. Hahn, *Judge McMillian in Good Position to Aid His Race*, ST. LOUIS GLOBE DEMOCRAT, Mar. 22, 1956, at 3A.

7. *Hearns Names First Black Judge to Appeals Court Here*, ST. LOUIS GLOBE DEMOCRAT, Oct. 25, 1972, at 4A; Harry Wilson, Jr., *From Tenement to Court Bench—He's Worked Hard*, ST. LOUIS GLOBE DEMOCRAT, Oct. 25, 1972, at 4A.

8. Edward H. Kohn, *McMillian's Judicial Record Shows Liberal Views, Dissent*, ST. LOUIS POST-DISPATCH, Aug. 6, 1978, at 1C; Paul Wagman, *McMillian Termed Ideal Choice For Appellate Post*, ST. LOUIS POST-DISPATCH, June 9, 1978, at 1B.

## AN ADVOCATE FOR EQUALITY

Throughout his career Judge McMillian has been an advocate for racial equality and the rights of disadvantaged individuals. Over the years he became a highly respected community leader, but never forgot his roots. In his frequent public speeches and comments to the press, Judge McMillian did not hesitate to condemn racial and economic injustice.<sup>9</sup> During his years as a juvenile court judge, he urged community leaders to improve the conditions of St. Louis' most impoverished residents. Judge McMillian devoted his off-duty hours to working with several civic and social organizations that served economically and socially disadvantaged individuals. For example, in 1965 he was elected chairman of the board of the St. Louis Human Development Corporation, a local anti-poverty agency.<sup>10</sup> He also served as the chairman of the advisory board of the Herbert Hoover Boys Club.<sup>11</sup>

Judge McMillian's judicial philosophy reflects his long-standing concern for the rights of minorities and other disadvantaged individuals. During a 1978 interview he expressed, "I'm a great believer in individual rights. I'm a great believer in the Bill of Rights."<sup>12</sup> In an interview with a *St. Louis Post-Dispatch* reporter that appeared during the pendency of his nomination to the Eighth Circuit, Judge McMillian said, "I want to be able to help the unfortunates, impoverished and disenchanted—those that need equal justice under the law."<sup>13</sup> Responding to another reporter's questions about his judicial philosophy Judge McMillian elaborated: "I'm not an ultra-conservative but I'm not one of these misty-eyed sentimentalists either. I have great regard for individual rights and

9. *Judge Backs Proposal To Let Poor Persons Sign Own Bail Bond: McMillian Says Present Requirements Deny Equal Justice to the Indigent*, Feb. 11, 1963, at 7A; Robert Teuscher, *The Trials and Tribulations of a Juvenile Judge: Lack of a Normal Home Life is Responsible For Plight of Many Youngsters Who Wind Up in His Court, Asserts Theodore A. McMillian*, ST. LOUIS GLOBE DEMOCRAT, Dec. 24, 1966, at 1C; *Judge McMillian Urges Ghetto Understanding*, ST. LOUIS GLOBE DEMOCRAT, June 13, 1967, at 4A; *Legal Aid to Poor Is Force Against Chaos, Says Judge*, ST. LOUIS GLOBE DEMOCRAT, Oct. 24, 1967, at 3A; George Morrison, *Growing Negro Anger: Judge Cites Famine and Hardship as the Reasons*, ST. LOUIS GLOBE DEMOCRAT, Mar. 28, 1969, at 16A; *Urges Police to Treat Ghetto Youths Humanely*, ST. LOUIS POST-DISPATCH, Apr. 27, 1969, at 19A; *Lack of Equality for Negroes Is Called Threat to Leadership*, ST. LOUIS GLOBE DEMOCRAT, May 16, 1969, at 9A; *McMillian Blames Society For Failure of Ghetto Children*, ST. LOUIS GLOBE DEMOCRAT, May 23, 1969, at 4A; *Judge Urges Courts to Provide Help for Youths*, ST. LOUIS GLOBE DEMOCRAT, May 17, 1977, at 6B.

10. *Judge McMillian Heads Anti-Poverty Agency*, ST. LOUIS GLOBE DEMOCRAT, Aug. 21, 1965, at 3A; Marguerite Shepard, *McMillian Re-elected Head Of St. Louis HDC Board*, ST. LOUIS GLOBE DEMOCRAT, Feb. 25, 1967, at 12A.

11. Sue Ann Wood, *Ground Broken for Boys' Club*, ST. LOUIS GLOBE DEMOCRAT, Aug. 9, 1966, at 3A.

12. Kohn, *supra* note 8, at 1C.

13. Gerald M. Boyd, *McMillian Nominated to Federal Judgeship*, ST. LOUIS POST-DISPATCH, Aug. 3, 1978, at 8A.

freedom and they must be protected, but I also believe society has rights to be preserved and protected.”<sup>14</sup>

This progressive philosophy—an unyielding support for the rights of individuals and a commitment to equal justice—is reflected in Judge McMillian’s decisions. During his twenty years on the Eighth Circuit, Judge McMillian has authored scores of opinions in Civil Rights cases. Some of these are reproduced in law school casebooks as examples of the proper application of statutory principles.<sup>15</sup> Another example of Judge McMillian’s jurisprudence can be found in *St. Mary’s Honor Center v. Hicks*, a case which altered the burden of proof in employment discrimination litigation.<sup>16</sup>

“PRETEXT PLUS” OR “PRETEXT ONLY”: *ST. MARY’S HONOR CENTER V. HICKS*

Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating on the basis of race, sex, religion, ethnicity and national origin.<sup>17</sup> In the years following the enactment of Title VII, two predominate theories emerged: disparate treatment and disparate impact.<sup>18</sup> Disparate impact cases focus on the discriminatory effect of facially-neutral employment policies.<sup>19</sup> In such cases plaintiffs are not required to prove intent.<sup>20</sup> It is enough to show a policy causes a disparate impact that is not supported by a business necessity. Disparate treatment cases, in contrast, involve episodes of intentional discrimination.

Unlike disparate impact cases, the disparate treatment theory requires plaintiffs to prove discriminatory motive. The burden of proof in disparate treatment cases was established in *McDonnell Douglas v. Green*.<sup>21</sup> To prevail a plaintiff must first establish a *prima-facie* case by showing that she applied

14. Floyd, *supra* note 1, at 3F.

15. See, e.g., Locke v. Kansas City Power and Light Co., 660 F.2d 359 (8th Cir. 1981) reprinted JOEL WILLIAM FRIEDMAN AND GEORGE M. STRICKLER, THE LAW OF EMPLOYMENT DISCRIMINATION: CASES AND MATERIALS (4th ed.) (explaining an aspect of the relief available to prevailing plaintiffs in employment discrimination cases). *Id.*

16. Hicks v. St. Mary’s Honor Ctr., 970 F.2d 487 (8th Cir. 1991).

17. 42 U.S.C. §§ 2000e *et seq.* (1964) (“[i]t shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.”) 42 U.S.C. § 2000e-2(a)(1).

18. For a discussion of the development of the two theories, see generally William N. Eskridge, Jr. & Philip P. Frickey, *Foreward: Law As Equilibrium*, 108 HARV. L. REV. 26, 30-31 (1994); Ronald Turner, *Thirty Years of Title VII’s Regulatory Regime: Rights, Theories, and Realities*, 46 ALA. L. REV. 375, 383 (1995).

19. International. Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

20. *Id.*

21. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-803 (1973); Texas Dep’t of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981).

for an available position, that she possessed the requisite qualifications and that she was not selected.<sup>22</sup> Thereafter, the employer must state a legitimate, non-discriminatory reason for its decision.<sup>23</sup> If the employer satisfies its rebuttal obligation, the plaintiff can obtain a favorable judgment if she proves that the proffered justification is pretextual and that the employer's actions were actually motivated by discriminatory animus.<sup>24</sup>

The *McDonnell Douglas* paradigm assumes that direct evidence of discriminatory motive is not available. The proof in such cases consists of indirect evidence. In the late nineteen eighties a question emerged regarding the consequence of proof of pretext.<sup>25</sup> Some courts held that a demonstration of pretext compelled a judgment for the plaintiff.<sup>26</sup> Others concluded that proof of pretext did not automatically result in a judgment for the plaintiff.<sup>27</sup> The confusion concerned the significance of inferences in disparate treatment cases. The debate reached the Supreme Court in *St. Mary's Honor Center v. Hicks*.

#### THE EIGHTH CIRCUIT'S OPINION

*Hicks* involved the discharge of an African-American prison guard at a Missouri correctional facility.<sup>28</sup> During the trial, the plaintiff established a *prima-facie* case under the disparate treatment theory, and he also proved, by a preponderance of evidence, that the reason given for his discharge was false.<sup>29</sup>

22. *Burdine*, 450 U.S. at 253.

23. *Id.*

24. *Id.*

25. See generally Catherine J. Lancot, *The Defendant Lies and the Plaintiff Loses: The Fallacy of the "Pretext Plus" Rule in Employment Discrimination Cases*, 43 HASTINGS L.J. 57 (1991); Hannah Arterion Furnish, *Formalistic Solutions to Complex Problems: The Supreme Court's Analysis of Individual Disparate Treatment Cases Under Title VII*, 6 INDUS. REL. L.J. 353 (1984).

26. See, e.g., *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 512-513 (1993) (listing cases that follow "pretext-only"); *Tye v. Board of Educ. of Polaris Joint Vocational Sch. Dist.*, 811 F.2d 315, 320 (6th Cir. 1987), *cert. denied*, 484 U.S. 924 (1987); *King v. Palmer*, 778 F.2d 878, 881 (D.C. Cir. 1985); *Duffy v. Wheeling Pittsburgh Steel Corp.*, 738 F.2d 1393, 1395-1396 (3d Cir. 1984), *cert. denied*, 469 U.S. 1087 (1984); *Lopez v. Metro. Life Ins. Co.*, 930 F.2d 157, 161 (2d Cir. 1990), *cert. denied*, 502 U.S. 880 (1991); *Caban-Wheeler v. Elsea*, 904 F.2d 1549, 1554 (11th Cir. 1990); *Thornbrough v. Columbus & Greenville R.R. Co.*, 760 F.2d 633, 639-640 (5th Cir. 1985).

27. See, e.g., *Hicks*, 509 U.S. at 512 (listing cases that follow pretext-plus); *EEOC v. Flasher Co.*, 986 F.2d 1312, 1321 (10th Cir. 1992); *Galbraith v. Northern Telecom, Inc.*, 944 F.2d 275, 282-283 (6th Cir. 1991); *Samuels v. Raytheon Corp.*, 934 F.2d 388, 392 (1st Cir. 1991); *Holder v. City of Raleigh*, 867 F.2d 823, 827-828 (4th Cir. 1989); *Benzies v. Ill. Dept. of Mental Health and Developmental Disabilities*, 810 F.2d 146, 148 (7th Cir. 1987), *cert. denied*, 483 U.S. 1006 (1987); *Clark v. Huntsville City Bd. of Educ.*, 717 F.2d 525, 529 (11th Cir. 1983).

28. *Hicks v. St. Mary's Honor Ctr.*, 756 F. Supp. 1244, 1245 (E.D. Mo. 1991).

29. *Id.* at 1250.

Despite this showing, the trial court entered a judgment for the employer.<sup>30</sup> The trial judge found that the plaintiff had proven pretext—that the defendant lied about its reason for discharging the plaintiff—but this evidence did not prove that the termination was motivated by discriminatory animus.<sup>31</sup>

[a]lthough plaintiff has proven the existence of a crusade to terminate him, he has not proven that the crusade was racially rather than personally motivated . . . [P]laintiff has succeeded in proving that the violations for which he was disciplined were pretextual reasons for his demotion and discharge. Plaintiff has not, however, proven by direct evidence or inference that his unfair treatment was motivated by his race.<sup>32</sup>

The Court of Appeals for the Eighth Circuit reversed.<sup>33</sup> Writing for the panel, Judge McMillian noted that there was no evidentiary basis for the trial judge's conclusion. As a consequence, it was "improper for the district court to assume – without evidence to support the assumption – that defendant's actions were somehow 'personally motivated.'"<sup>34</sup> The panel held that under these circumstances, the only inference that could be drawn was that the supervisor's actions were motivated by discriminatory animus. To support this conclusion, Judge McMillian relied on well-established precedent. Quoting the majority's opinion in *Furnco Construction Co. v. Waters*,<sup>35</sup> Judge McMillian explained that:

A prima facie case under McDonnell Douglas raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors. . . . And we are willing to presume this largely because we know from our experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. Thus, when all legitimate reasons for [the adverse employment action] have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with some reason, based [its] decision on an impermissible consideration such as race.<sup>36</sup>

Because the proffered justification was proven to be false in *Hicks* the Eighth Circuit held that: "If the plaintiff has met his or her burden of proof at the pretext stage . . . the plaintiff has satisfied his or her ultimate burden of persuasion. No additional proof of discrimination is required."<sup>37</sup> This

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30. *Id.* at 1253.

31. *Id.* at 1252.

32. *Id.*

33. *Hicks*, 970 F.2d at 493.

34. *Id.* at 492.

35. *Furnco Constr. Corp. v. Waters*, 438 U.S. 567 (1978).

36. *Hicks*, 970 F.2d at 492.

37. *Id.* at 493.

interpretation recognizes that an inference of discriminatory intent can be drawn from evidence demonstrating pretext.

#### THE SUPREME COURT'S OPINION IN *HICKS*

The Supreme Court granted certiorari and reversed the Eighth Circuit's decision.<sup>38</sup> Writing for the majority, Associate Justice Antonin Scalia emphasized that a plaintiff in a disparate treatment case is obligated to establish that discriminatory intent motivated the employer's decision.<sup>39</sup> Evidence which disproves the employer's proffered justification, does not necessarily satisfy this obligation.<sup>40</sup> Justice Scalia argued that "a reason cannot be proved to be a 'pretext for discrimination' unless it is shown *both* that the reason was false, *and* that discrimination was the real reason."<sup>41</sup> An employer may be dishonest about its rationale for terminating an employee; however, the employer's falsehood is not a pretext for discrimination in every situation.<sup>42</sup>

38. *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 525 (1993).

39. *Id.* at 511 (relying on the analysis of *McDonnell Douglas* and *Burdine* which emphasized that the burden of proving discriminatory animus always remains with the plaintiff). *Id.*

40. *Id.* at 515-18. It should be noted that this interpretation is inconsistent with the holding in *Burdine* where the Court found that a plaintiff could succeed "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." 450 U.S. at 256. To justify this departure from precedent the majority in *Hicks* found that this passage was inadvertent and wholly inconsistent with the remaining analysis in *Burdine*. *Id.* Several commentators have criticized this strained construction. See Mark S. Brodin, *The Demise of Circumstantial Proof in Employment Discrimination Litigation: St. Mary's Honor Center v. Hicks, Pretext, and the "Personality" Excuse*, 18 BERKELEY J. EMP. & LAB. L. 183 (1997); Robert Brookins, *Hicks, Lies, and Ideology: The Wages of Sin is Now Exculpation*, 28 CREIGHTON L. REV. 939 (1995); Derrick L. Homer, *Toward Clarifying the Ambiguity of Merging Burdens—St. Mary's Honor Center v. Hicks* 113 S.Ct. 2742 (1993), 11 HARV. BLACKLETTER J. 205 (1994); Louis M. Rappaport, Note, *St. Mary's Honor Center v. Hicks: Has the Supreme Court Turned Its Back on Title VII By Rejecting "Pretext-Only"?*, 39 VILL. L. REV. 123 (1994).

41. *Hicks*, 509 U.S. at 515 (emphasis added). The majority relied on the common law rules of presumptions to conclude that once a presumption has been rebutted, the plaintiff retains the ultimate burden of persuasion and "nothing in law would permit us to substitute for the required finding that the employer's action was the product of unlawful discrimination, the much different (and much lesser) *finding*, that the employer's explanation of its action was not believable." *Id.* at 514-15 (emphasis added).

42. See *Hicks*, 509 U.S. at 519-24. See also *Veatch v. Northwestern Mem'l Hosp.*, 730 F. Supp. 809, 819 (N.D. Ill. 1990) (holding that, "even if the employer lies about the real reasons for the firing, other reasons, not impermissible under federal law, might be suggested by the evidence.") *Id.*; Shannon R. Joseph, Note, *Employment Discrimination: Shouldering the Burden of Proof After St. Mary's Honor Center v. Hicks*, 29 WAKE FOREST L. REV. 963 (1994); Julyn M. McCarty & Michael J. Levy, *Focusing Title VII: The Supreme Court Continues the Battle Against Intentional Discrimination in St. Mary's Honor Center v. Hicks*, 14 HOFSTRA LAB. L. J. 177 (1996).



Employers may have other motives that they choose not to reveal.<sup>43</sup> In the majority's view, the "pretext only" approach was not consistent with the plaintiff's obligation to prove discriminatory intent, since it did not allow for this possibility.<sup>44</sup>

Justice Scalia also argued that proponents of the "pretext only" standard failed to appreciate the limitations of a *prima-facie* case.<sup>45</sup> This threshold showing merely establishes that the plaintiff applied for an available position and possessed the requisite qualifications.<sup>46</sup> If the plaintiff was a member of a protected group and the position remained open, or someone else was selected, a presumption of discrimination arises.<sup>47</sup> However, once the employer articulates a nondiscriminatory reason for its action, "[t]he presumption [of discrimination], having fulfilled its role of forcing the defendant to come forward with some response, simply drops out of the picture."<sup>48</sup> After this initial phase, the case proceeds to the next level of inquiry: whether the employer's decision was based on unlawful discrimination.<sup>49</sup> If the plaintiff proves that the employer's proffered justification is not true, she still has an obligation to persuade the fact-finder that the employer was motivated by discriminatory animus.<sup>50</sup> In Justice Scalia's view, "[i]t is not enough, in other words, to *disbelieve* the employer; the fact-finder must *believe* the plaintiff's explanation of intentional discrimination."<sup>51</sup> As the discussion in the following sections demonstrates, this flawed interpretation confuses the plaintiff's ultimate burden of proving discriminatory intent with the requirement of establishing an evidentiary foundation for an inference of discriminatory motive.

#### MODIFYING BURDEN OF PROOF IN DISPARATE TREATMENT CASES

The holding in *Hicks* was controversial. Commentators complained that it distorted the adversarial process and reduced the *McDonnell Douglas* approach

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43. *Hicks*, 509 U.S. at 523-24.

44. *Id.* at 511-12.

45. *Id.* at 509.

46. *Id.* at 513.

47. *Id.*

48. *Hicks*, 509 U.S. at 510-11. This characterization of a presumption disappearing from the case is consistent with the common law view of presumptions, often known as the "bursting bubble" theory, and has been codified in Federal Rule of Evidence 301. See generally Lancot, *supra* note 25, at 104.

49. *Hicks*, 509 U.S. at 510-11.

50. *Id.* at 519.

51. *Id.* at 519. To support this interpretation Justice Scalia also relied on Rule 301 of the Federal Rules of Evidence which states that a presumption shifts the burden of production rather than the overall burden of proof. *Id.*

to an “empty ritual.”<sup>52</sup> At minimum, *Hicks* modified the *McDonnell Douglas* paradigm and imposed a heightened and unwarranted proof regime, making it far more difficult for plaintiffs to prevail in disparate treatment cases.<sup>53</sup> If the holding in *Hicks* meant only that proof of pretext does not *always* compel a judgment for the plaintiff, it would not be an unreasonable interpretation of the burden of proof in disparate treatment cases. *Hicks* does not endorse “pretext only” or “pretext plus.” Rather, it attempts to chart a course that flows between these interpretations. This is made clear by Justice Scalia’s reluctant concession that proof of pretext is all the evidence that is needed to prevail on the merits:

The factfinder’s disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with elements of the prima-facie case, suffice to show intentional discrimination. Thus, rejection of the defendant’s proffered reasons will *permit* the trier of fact to infer the ultimate fact of intentional discrimination.<sup>54</sup>

Justice Scalia’s analysis is premised on his concern that an employer who deliberately lies in formal legal proceedings may have a nondiscriminatory reason for its’ actions which were never disclosed. The problem with this premise, as Justice Souter makes clear in his dissent, is that it does not reflect an accurate understanding of what occurs in civil actions.<sup>55</sup> The discovery provisions of the Federal Rules of Civil Procedure were designed to eliminate surprises in civil litigation.<sup>56</sup> Trials in discrimination cases take place after extensive pre-trial discovery. The key individuals in the decision-making process will have been deposed. The employer’s rebuttal burden obligates it to state some reason for its adverse action.<sup>57</sup> Any personnel records or other documents which reflect (or are inconsistent with) the employer’s decision will have been produced and examined prior to the trial.<sup>58</sup>

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52. Brodin, *supra* note 40, at 200-10 (commenting that *Hicks* distorts the litigation process and makes it more difficult for plaintiffs to prevail) *Id.*; See generally Jerome McCristal Culp, Jr., *Small Numbers, Big Problems, Black Men, and The Supreme Court: A Reform Program For Title VII After Hicks*, 23 CAP. U. L. REV. 241 (1994).

53. Culp, *supra* note 52, at 1009-10. There is also a bitter irony in *Hicks*—dishonest defendants are not penalized for their mendacity. As one commentator observed, “[t]he defendant lies and the plaintiff loses.” Lancot, *supra* note 25.

54. *Hicks*, 509 U.S. at 511.

55. *Id.* at 536.

56. FED. R. CIV. P. 26 advisory committee’s note (1983 Amendment) (“The purpose of discovery is to provide a mechanism for making relevant information available to the litigants. ‘Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation.’” (citing *Hickman v. Taylor*, 329 U.S. 495, 507 (1947))).

57. *Burdine*, 450 U.S. at 254 (“[I]f the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case.”) *Id.*

58. FED. R. CIV. P. 26(a) provides: “a party shall, without awaiting a discovery request, provide to other parties: (A) the name . . . of each individual likely to have discoverable

After the close of discovery, the court may order parties to submit detailed pre-trial statements indicating, among other things, the disputed and undisputed facts.<sup>59</sup> These statements provide the basis for the final, pre-trial order.<sup>60</sup> This order limits the scope of the trial.<sup>61</sup> It identifies the witnesses, summarizes their testimony and describes all of the documentary evidence that will be presented.<sup>62</sup> When the trial finally takes place, the parties and their attorneys know what testimony and documentary evidence will be produced. There are rarely any unanticipated developments during the trial. Evidence that is not identified in the pre-trial statement may be disallowed.<sup>63</sup> Given this process, it is unlikely that during the trial the actual reason for an employer's decision will emerge for the first time entirely unanticipated by the parties or their attorneys.<sup>64</sup> *Hicks* fails to recognize this reality. This is why many commentators correctly observed that *Hicks* distorted the view of the adversarial process and redefined the *McDonnell Douglas* order and allocation of proof in a manner that was not warranted.<sup>65</sup> These criticisms are well founded, but there is more to the Court's decision than the existing commentary suggests.

In *Hicks*, the trial judge disregarded the implications of the supervisor's dishonest testimony and found a neutral reason for supervisor's actions: a reason not supported by *any* evidence presented during the trial.<sup>66</sup> The court seemingly believed any motivation for the employer's actions except unlawful discrimination. This "any reason but discrimination" approach assumes a society in which racial and other biases have been eliminated.<sup>67</sup> Under this view, discriminatory animus would be among the least likely motivations for

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information relevant to disputed facts; (B) a copy of, or a description by category and location of, all documents . . . that are relevant to disputed facts". *Id.*

59. FED. R. CIV. P. 16(c).

60. FED. R. CIV. P. 16(e) provides in part: "After any conference held pursuant to this rule, an order shall be entered reciting the action taken. This order shall control the subsequent course of the action unless modified by a subsequent order." *Id.*

61. *Id.*

62. FED. R. CIV. P. 16(c).

63. FED. R. CIV. P. 16(e) allows the pretrial order only to be modified to "prevent manifest injustice." *Id.*

64. MICHAEL ZIMMER ET. AL., CASES AND MATERIAL ON EMPLOYMENT DISCRIMINATION 106 (3d ed. 1994).

65. See generally Brodin, *supra* note 40, at 209-10.

66. *Hicks*, 756 F. Supp. at 1244, (holding that personal animosity was the reason for the employer's action, although that reason had not been proffered by the defendant). *Id.*

67. See generally Jerome McCristal Culp, Jr., *Neutrality, the Race Question, and the 1991 Civil Rights Act: The "Impossibility" of Permanent Reform*, 45 RUTGERS L. REV. 965 (1993); Deborah A. Calloway, *St. Mary's Honor Center v. Hicks: Questioning the Basic Assumption*, 26 CONN. L. REV. 997 (1994); Juan F. Perea, *Ethnicity and Prejudice: Reevaluating "National Origin" Discrimination Under Title VII*, 35 WM. & MARY L. REV. 805 (1994).

an employer's actions.<sup>68</sup> This doubt and reluctance has implications beyond the modifications that *Hicks* made to existing precedent. It is infecting the lower courts' evaluation of civil rights claims and creating a heightened burden of proof for plaintiffs.

Despite false testimony exposed during the trial and a pattern of adverse actions against African-American employees generally, and Hicks in particular, the trial judge was not persuaded that the supervisor's actions were motivated by discrimination. This reluctance to believe that discrimination regularly occurs is infecting the courts' evaluation of civil rights claims. This imposes an unacknowledged burden on plaintiffs that cannot be justified. A plaintiff must surmount the court's underlying skepticism as well as meeting the formal burdens of persuasion.<sup>69</sup>

#### THE IMPOSITION OF A HEIGHTENED PROOF REGIME

The critical flaw in *Hicks* is the way in which the majority misconstrued the significance of inferences that are permitted by an adequate evidentiary foundation.<sup>70</sup> Justice Scalia acknowledged that a fact-finder could infer discriminatory motive from the plaintiff's proof of pretext, but he was unwilling to recognize the likelihood of this conclusion.<sup>71</sup> If the employer lies about the reason that it fired the plaintiff, it is more likely than not that the actual reason is one that is adverse to its interests.<sup>72</sup> In most cases the fact-finder is presented with evidence of two alternatives; a discriminatory motive

68. Culp, *supra* note 52 (arguing that courts can always point to neutral non-discriminatory actions such as economics to explain any employment action).

69. Laura Gatland, *Courts Behaving Badly: Task Forces Say Some Judges Impatient With Job Bias Cases*, 83 A.B.A. J. 30 (1997). This article reported that surveys conducted in the Ninth, Second, Eighth and District of Columbia Circuits found that lawyers believe that trial judges downplay the importance of employment discrimination claims. *Id.* A Second Circuit Task Force concluded that trial judges appeared to believe that discrimination cases were too trivial for their attention. *Id.* The Eighth Circuit's Task Force reported that judges seem impatient with sex discrimination claims and that cases were concluded without adequate time for discovery. *Id.* The Task Force for the Ninth Circuit reported similar complaints. *Id.* Although these surveys reflect findings in three federal circuits, they evidence a widespread sentiment among attorneys who represent plaintiffs in employment discrimination cases. *Id.*

70. Fact-finders are allowed to draw any inference that is reasonable in light of the facts proven. 12 EDWARD J. DEVITT & CHARLES B. BLACKMAR, *FEDERAL JURY PRACTICE AND INSTRUCTIONS* § 72.04 at 619 (3d ed. 1977) ("[The factfinder is] permitted to draw, from facts which you find have been proved, such reasonable inferences as seems justified in the light of your experience.").

71. *Hicks*, 509 U.S. at 511.

72. The "adverse inference" rule is a long-standing common law principle. When a litigant withholds evidence, the inference should be drawn that the undisclosed evidence would be unfavorable to that party. WIGMORE, *EVIDENCE*, § 285 (Chadborn Rev. 1979). *See generally* Brodin, *supra* note 40, at 212.

versus one that is legitimate. In *Hicks* and the vast majority of Title VII cases there is no evidence which would support a third conclusion.

The logic of an inference of discriminatory animus is even more apparent when one considers that an employer can escape liability by disclosing any justification for its decision.<sup>73</sup> It is not necessary that the reason be a rational one. It could be entirely capricious or illegal under other laws as long as it is not based on discriminatory animus.<sup>74</sup> Given the range of options that are available, why would an employer lie *except* to hide a discriminatory motive? As individuals familiar with the litigation process know, the risks posed by dishonest testimony during a trial are unusually high. At the conclusion of a trial an instruction is given that the jury can choose to disbelieve any or all of a witness' testimony if any part of it is shown to be untrustworthy.<sup>75</sup> This means that if any portion of a key witness's testimony is shown to be false, the credibility of the entire case is considerably and often fatally, undermined. By failing to recognize this, *Hicks* painted a distorted picture of the litigation process. An inference of discriminatory intent is the most logical inference if the proffered justification is proven to be false. In most cases, the evidence will not support a different conclusion.

*Hicks* also imposes an unwarranted evidentiary burden on plaintiffs. Despite its purported embrace of the permissive standard, there are passages within the majority's opinion that strongly suggest a "pretext plus" requirement.<sup>76</sup> To justify his rejection of the compulsory inference, Justice Scalia emphasized that a false justification for discharging an employee does not violate Title VII "unless it is shown *both* that the reason was false, and that discrimination was the real reason."<sup>77</sup> In another passage, Justice Scalia reiterated this point stating that a plaintiff cannot prevail merely by showing that the employer lied about its reason for discharging the plaintiff.<sup>78</sup> He emphasized that, "[t]he fact-finder must *believe* the plaintiff's explanation of intentional discrimination."<sup>79</sup>

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73. *Burdine*, 450 U.S. at 255-258.

74. *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 612-613 (1993) holding that the employer can rely on a reason that is illegal under other laws); *Purkett v. Elem.*, 514 U.S. 765, 775 (1995) (facially implausible, silly, or fantastic reasons are sufficient to satisfy the employer's rebuttal burden).

75. 12 EDWARD J. DEVITT & CHARLES B. BLACKMAR, *FEDERAL JURY PRACTICE AND INSTRUCTIONS* § 73.04 at 619 (3d ed. 1977) ("If a witness is shown knowingly to have testified falsely concerning any material matter, you have a right to distrust such witness's testimony in other particulars; and you may reject all the testimony of that witness or give it such credibility as you may think it deserves.").

76. See generally Terri L. Dill, *St. Mary's Honor Center v. Hicks: Refining the Burdens of Proof in Employment Discrimination Litigation*, 48 ARK. L. REV. 617 (1995).

77. *Hicks*, 509 U.S. at 515.

78. *Id.* at 519.

79. *Id.*

This analysis suggests two separate levels of proof: the first showing that the proffered justification is false; the second demonstrating that the actual reason for the employer's action is grounded in unlawful discrimination. These passages coupled with Justice Scalia's insistence that the presumption created by the *prima-facie* case "simply drops out of the picture"<sup>80</sup> imply an obligation to produce evidence of pretext as well as independent proof of discriminatory intent. But this is not what is actually required. It is important to note that disparate treatment cases presume the absence of direct evidence of discrimination. Because there is no "smoking gun" evidence, a finding of discriminatory motive is based on proof that provides a foundation for an inference of intent. Hence, if an employer proffers a false reason for its actions, the fact-finder is permitted to *infer* a discriminatory motive. This inference is permissive rather than mandatory, but it will be the most logical one in most cases.

By insisting that the evidence of pretext must also prove discriminatory intent the majority in *Hicks* has heightened the plaintiff's evidentiary burden to a level that is entirely unwarranted. Justice Scalia's analysis confused the plaintiff's ultimate burden – to prove, by a preponderance of evidence, that the employer's actions were motivated by discrimination – with the obligation to produce the evidence needed to establish a foundation for an inference of intent. However, as Judge McMillian explained in the Eighth Circuit's opinion, evidence demonstrating pretext provides an adequate foundation for an inference of motive, "no additional proof of discrimination is required."<sup>81</sup> The heightened proof regime imposed by *Hicks* is based on faulty analysis and has made it far more difficult for plaintiffs to prevail in disparate treatment cases. This new evidentiary requirement will prevent plaintiffs with legitimate claims from prevailing against the perpetrators of unlawful employment practices.<sup>82</sup>

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80. *Id.* at 511.

81. *Hicks*, 970 F.2d at 492.

82. The flawed analysis in *Hicks* has caused considerable confusion in the evaluation of summary judgment motions in disparate treatment cases. Some circuits have adopted a "pretext only" approach under which evidence of pretext is sufficient to defeat a defendant's motion for summary judgment. Others have embraced a "pretext plus" approach which requires plaintiffs to produce evidence showing that the defendant's proffered justification is both false and a pretext for unlawful discrimination. See generally Karen W. Kramer, *Overcoming Higher Hurdles: Shifting the Burden of Proof after Hicks and Ezold*, 63 GEO. WASH. L. REV. 404 (1995); Jody H. Odell, *Between Pretext Only and Pretext Plus: Understanding St. Mary's Honor Center v. Hicks and Its Application to Summary Judgment*, 69 NOTRE DAME L. REV. 1251 (1994); Julie Tang and Hon. Theodore M. McMillian, *Eighth Circuit Employment Discrimination Law: Hicks and Its Impact on Summary Judgment*, 41 ST. LOUIS U. L.J. 519 (1997). The "pretext plus approach" that some circuits require fails to recognize that a plaintiff can prevail on the merits on the basis of proof of pretext alone. The "pretext-plus" interpretation misconstrues the plaintiff's burden of

## CONCLUSION

In a speech that was delivered during a Dr. Martin Luther King birthday celebration, Judge McMillian expressed his concerns about the current direction of the federal judiciary:

[A]ll of our victories of the 1960s are at risk; victories by those who risked their lives by following and supporting Reverend Martin Luther King and other courageous men and women in the struggle for civil rights. Our schools are being re-segregated; affirmative action is dying. The Supreme Court, the last forum for civil rights, is now controlled by conservative justices appointed by President Reagan. They have used a deft scalpel to whittle away at the rights guaranteed by the Civil Rights Acts of 1964 and 1972.<sup>83</sup>

Judge McMillian is in a unique position to evaluate the direction of the Supreme Court. When he enrolled in segregated Lincoln University in the late 1930's he could not attend the University of Missouri. At the time another Lincoln graduate, Lloyd Gaines, was challenging that institution's exclusion of African-American students. The Supreme Court's 1938 decision in *Missouri ex rel. Gaines v. Canada*<sup>84</sup> was the first in a long line of cases in which the African-American student successfully challenged segregation laws in the courts. In the late 1940's, when Judge McMillian was a student at St. Louis University, the Supreme Court decided *Shelley v. Kraemer*,<sup>85</sup> the case that struck down racially restrictive covenants. A few years later when Judge McMillian was an Assistant Circuit Attorney, the Supreme Court issued its 1954 decision, *Brown v. Board of Education*,<sup>86</sup> which declared segregation in public schools unconstitutional. During the years that he presided over the Juvenile Court, Congress enacted the Civil Rights Act of 1964, the Voting Rights Act of 1965 and the Fair Housing Act of 1968.

These were years of progress towards racial equality. The system of state-sponsored segregation was eliminated, in large measure, by an enlightened federal judiciary. This trend changed dramatically in the late 1980's when the current Supreme Court majority was completed by a series of Reagan appointments. Justice Scalia's analysis in *St. Mary's Honor Center v. Hicks* reflects the current majority's regressive approach to civil rights issues. It is not a posture that is receptive to the claims of plaintiffs in civil rights cases. It is not an approach that advocates equality.

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production because it requires *more* evidence at the summary judgment phase than a plaintiff needs to prevail at the trial.

83. William H. Shaw, *Why Judge McMillian Worries*, ST. LOUIS POST-DISPATCH, Aug. 11, 1991.

84. *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938).

85. *Shelley v. Kraemer*, 334 U.S. 1 (1948).

86. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).